

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST )	
FOR REVIEW BY: )	CHARGE NO.: 2009CA0918
)	EEOC NO.: 21BA83243
<b>MERT MARTIN,</b> )	ALS NO.: 09-0729
)	
Petitioner. )	

**ORDER**

This matter coming before the Commission by a panel of three, Commissioners David Chang, Marylee V. Freeman and Charles E. Box presiding, upon Mert Martin's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")<sup>1</sup> of Charge No. 2009CA0918; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED**:

- (1) The Respondent's dismissal of Count A, Count B, and Count C of the Petitioner's charge is **VACATED**, and Counts A-C of the charge are **REINSTATED** and **REMANDED** to the Respondent for **FURTHER INVESTIGATION**; and
- (2) The Respondent's dismissal of Count D and Count E, and Count F of the Petitioner's charge is **SUSTAINED** for **LACK OF SUBSTANTIAL EVIDENCE**.

In support of which determination the Commission states the following findings of fact and reasons:

1. On September 26, 2008, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged his employer Rock Island Integrated Services ("Employer") discriminated against him because of his race, Black (Counts A & D), and his age, 46 (Counts B & E), in violation of Section 2-102(A) of the Illinois Human Rights Act (the "Act"), and further that the Employer retaliated against him for having opposed unlawful discrimination (Counts C & F), in violation of Section 6-101(A) of the Act. On November 25, 2009, the Respondent dismissed all counts of the Petitioner's charge for Lack of Substantial Evidence. On December 17, 2009, the Petitioner timely filed his Request.
2. The Employer provides operations and maintenance services for the Rock Island Arsenal, a United States Military installation.

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<sup>1</sup> In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Department's action shall be referred to as the "Petitioner."

3. The Employer initially hired the Petitioner in December 2005 as a Grounds Maintenance Laborer, which position included maintaining the grounds of the Arsenal.
4. On December 12, 2007, the Employer discharged the Petitioner. The Petitioner alleged in his charge that he engaged in a protected activity when he...“opposed that [Petitioner’s] discharge was based on [the Petitioner’s] race.”
5. On February 1, 2008, the Employer reinstated the Petitioner to his position.
6. On June 9, 2008, the Petitioner was informed by his supervisor that the Petitioner needed permission to leave his work area before going to the restroom.
7. Pursuant to United States Department of Transportation (“DOT”) regulations, the Employer was required to conduct random drug and alcohol testing on its employees. In order to comply with DOT regulations, the Employer used a third party provider, Alltest, to select names at random for quarterly testing.
8. On June 10, 2008, the Employer informed the Petitioner that he had been selected to take a drug and alcohol test.
9. On June 10, 2008, a 42-year-old non-Black employee who had not engaged in protected activity, was also selected for drug and alcohol testing pursuant to DOT regulations.
10. In his charge, the Petitioner alleged in Counts A-C that the Employer required him to ask permission to leave his work area in order to use the restroom because of the Petitioner’s race, age, and as retaliation for his having opposed discrimination after he was discharged in December 2007. Further, in Counts D-F, the Petitioner alleged the Employer discriminated against him because of his race and age, and retaliated against him, by requiring him to take a drug and alcohol test on June 10, 2008. In his Request, the Petitioner submits the names and contact information for additional witnesses he contends can provide evidence in support of his allegations in Counts A-C.
11. In its Response, the Respondent asks the Commission to vacate the dismissal of Counts A-C and remand those counts to the Respondent for further investigation in light of the additional evidence submitted by the Petitioner in his Request.
12. However, the Respondent asks the Commission to sustain the dismissal of Counts D-F for lack of substantial evidence because it determined there was insufficient evidence to establish the existence of a prima facie case of discrimination or retaliation in the administration of the drug and alcohol test.

**CONCLUSION**

The Commission concludes the Respondent properly dismissed Counts D-F of the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, \* 2 ( March 7, 1995)(1995 WL 793258).

In the Petitioner's case, there is no substantial evidence the Employer caused the Petitioner to submit to drug and alcohol testing due to his age, race, or in retaliation for having engaged in protected activity. As to the race and retaliation claims in Counts E & F, respectively, the undisputed evidence shows that on the same date, June 10, 2008, an employee outside of those protected classes was also required to submit to a random drug and alcohol test. Therefore, there is insufficient evidence of a *prima facie* case of race discrimination and retaliation because a similarly situated employee outside of those protected classes was treated the same under similar circumstances.

As to the Petitioner's age discrimination claim in Count D, assuming *arguendo* there was sufficient evidence of a *prima facie* case, the Employer articulated a non-discriminatory reason for requiring the Petitioner to submit to testing. Specifically, the Employer was required to comply with DOT regulations. There is no substantial evidence this stated reason was pretext for age discrimination. Further undercutting the Petitioner's claim is the fact that a third-party provider actually selected those who would be tested; thus, the Employer had no control over whom was selected for testing during any given quarter. In the absence of any evidence that the business consideration relied upon by the Employer was a pretext for unlawful discrimination, the Commission cannot substitute its judgment for the Employer's business judgment. See Berry and State of Illinois, Department of Mental Health and Developmental Disabilities, IHRC, ALS No. S-9146 (December 10, 1997).

Accordingly, it is the Commission's decision that the Petitioner has not presented any evidence to show that the Respondent's dismissal of Counts D-F of his charge was not in accordance with the Act. The Petitioner's Request as to Counts D-F is not persuasive.

However, because the Respondent does not oppose the Petitioner's Request as to Counts A-C, and instead wishes to conduct further investigation in light of additional evidence submitted by the Petitioner relevant to those Counts, the dismissal of Counts A-C of the charge will be vacated and Counts A-C will be reinstated and remanded to the Respondent for further investigation.

**THEREFORE, IT IS HEREBY ORDERED THAT:**

- (1) The Respondent's dismissal of Count A, Count B, and Count C of the Petitioner's charge is **VACATED**, and Counts A-C of the charge are **REINSTATED** and **REMANDED** to the Respondent for **FURTHER INVESTIGATION**; and
- (2) The Respondent's dismissal of Count D and Count E and Count F of the Petitioner's charge is **SUSTAINED** for **LACK OF SUBSTANTIAL EVIDENCE**.

*This Order is Not Yet Final and Appealable.*

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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Entered this 14<sup>th</sup> day of July 2010.

Commissioner David Chang

Commissioner Marylee Freeman

Commissioner Charles E. Box